IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Petitioners,

vs.

MS. CIDNI CAREY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the Order entered on May 8, 1979, by the United States Court of Appeals for the Second Circuit, which by a divided court, reversed the order and decision of the United States District Court for the Southern District of New York. The District Court had denied respondent's request for an award of attorneys' fees, under §706(k) of 42 U.S.C. §2000e-5(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.;* the fees claimed are for private legal representation in a New York State Administrative proceeding under the New York Human Rights Law, Article 15 Executive Law.

The Court of Appeals herein held in effect that a party who has succeeded in a New York State Administrative proceeding brought to enjoin unlawful discrimination in

employment has a Federal cause of action for the fees of private counsel who represented that party at the State level.*

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit filed May 8, 1979, has not yet been officially reported and is set forth in the Appendix hereto. The Memorandum Decision of the District Court filed on September 21, 1978 is set forth at A1.

The dissenting opinion of Judge William H. Mulligan, filed on May 8, 1979, is set forth at A15.

The opinion of Hon. Henry F. Werker, Judge of the District Court, is reported at 458 F.Supp. 79 as *Carey* v. *New York Gaslight Club, Inc.*, and is set forth in the Appendix hereto at A24.

Jurisdiction

The Order of the Court of Appeals was entered on May 8, 1979. No petition for rehearing was filed. The jurisdiction of this Court is based upon 28 U.S.C. §1254(1).

Questions Presented

1) Does §706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), create a Federal cause of action for attorneys fees (without regard to amount or diversity) for services rendered in State proceedings?**

* The memorandum decision of the District Court Judge denying counsel fees was filed September 21, 1978. However, an Order dismissing the complaint and marking the case off the calendar had previously been filed in the District Court on July 27, 1978. No appeal was taken from the order of dismissal. (A35)

** Respondent's counsel sought allowance of $8,200.00 below.

2) May the District Court, solely on the basis of vindication by New York State of a civil right, allow counsel fees to a party where New York Law makes no provision for such allowance?

3) May a plaintiff, whose complaint in the District Court for enforcement of her civil rights in employment and for compensatory damages has been dismissed, be regarded as a "prevailing party" for the purpose of awarding attorneys fees to her as a part of costs?

4) Does the statutory scheme of Article 15 of the Executive Law (Human Rights Law of the State of New York) afford adequate and comprehensive relief in conformity with congressional policy.*

Statement of the Case

This petition is based upon the following facts, which are not in dispute. On or about January 9, 1975, respondent filed a Complaint with the New York District Office of the Equal Employment Opportunity Commission ("EEOC"). That Complaint was then referred by the EEOC to The New York State Division of Human Rights following which on or about February 21, 1975 respondent filed her Complaint with the New York State Division of Human Rights charging that The Gaslight Club, Inc. (petitioner) was discriminating against her because of her race and color (A62).

On May 27, 1975 The New York State Division of Human Rights found probable cause and recommended a public hearing. The hearings were held on September 22, 1975 and January 15, 1976, resulting on August 13, 1976 of a

* Section 297(4)(a), New York Human Rights Law, requires the Human Rights Division to present the complainant's case at the administrative level.

finding of discrimination by The New York State Commissioner (A67).

On August 20, 1976 petitioner filed a Notice of Appeal from the Order of the Commissioner to The New York State Human Rights Appeal Board.

On August 26, 1977, The New York State Human Rights Appeal Board affirmed the decision of The New York State Division of Human Rights. In the meantime, on July 13, 1977 the EEOC had written to respondent declining to litigate her matter and enclosing a notice of her right to sue on her behalf, reserving the right of the Commissioner to seek status as intervenor in any such action which she might commence.

On September 20, 1977 respondent commenced an action in the United States District Court for the Southern District of New York. Her Complaint requested the identical relief which had already been granted to her in full by The New York State Division of Human Rights and affirmed by its Appeal Board; the Federal complaint also requested costs and attorneys' fees (A29).

The determination of The New York State Human Rights Appeal Board was affirmed without costs and without disbursements by Order of the Appellate Division of the Supreme Court, First Judicial Department, on November 3, 1977 on an appeal taken by petitioner, and leave to appeal was denied with Twenty ($20.00) Dollars costs in both the Appellate Division of the New York Supreme Court and in the New York Court of Appeals.

On July 28, 1978, the respondent's action in the United States District Court for the Southern District of New York was dismissed (see copy of Order of dismissal annexed hereto A35). A motion then pending brought on by the respondent for an award of counsel fees to pay her private counsel for representation in the State proceedings was decided on September 21, 1978 by Judge Henry F. Werker. He denied the motion. A motion to reargue that denial was denied on November 3, 1978. On November 28, 1978, the respondent appealed to the Circuit Court of Appeals for the Second Circuit from both decisions of Judge Werker.

On May 8, 1979, the United States Court of Appeals for the Second Circuit filed a decision (with a dissenting opinion) and order reversing the decision of Judge Werker and remanding the matter to the District Court for allowance of attorneys fees.

Reasons for Granting the Writ

The opinion (and dissenting opinion in the Court of Appeals for the Second Circuit) state that it is without precedent. It decided an important question which has not been but should be decided by this Court.

The decision of the Court of Appeals sanctioned a departure by the District Court from the requirement as a matter of law that it first conduct its own inquiry as to the claimed discriminatory employment practices before it could make any award of counsel fees to a prevailing party. The Court of Appeals thereby mandated full faith and credit to the New York State proceeding, notwithstanding that the congressional policies embodied in Title VII require that *res adjudicata* not be applied to state adjudication in the Civil Rights field. Moreover, the order dismissing the complaint (not on appeal) deprived the District Court of further jurisdiction to determine who is the prevailing party, thereby precluding any award of counsel fees.

The Court of Appeals has construed §2000e-5(k) contrary to the plain language and intent of the statute.

Argument Amplifying the Reasons Relied On

The decision of the Court of Appeals is contrary to applicable Federal law, *Fischer* v. *Adams,* 572 F.2d 406 (1st Cir. 1973); *Parker* v. *Califano,* 561 F.2d 340 (D.C. Cir. 1977); *Foster* v. *Boorstin,* 561 F.2d 340 (D.C. Cir. 1977); *Voutsis* v. *Union Carbide Corp.,* 452 F.2d 889 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972). Although Title VII provides that:

> "In any action or proceeding under this subchapter the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . ." (42 U.S.C. §2000e-5(k)).

the Court of Appeals directed the award of attorneys' fees to complainant herein, who prevailed, not in a Title VII proceeding within the Federal remedial framework, but rather in a state agency proceeding. The New York State Law makes no provision for the compensation of private counsel, but provides agency counsel at no expense to the complainant. The attorneys' fee provision of the Civil Rights Act of 1964, incorporated in the Civil Rights Attorneys' Fee Awards Act of 1976, 42 U.S.C. §1988, explicitly authorizes the District Court, in its discretion, to award reasonable attorneys' fees as part of the cost of bringing an action to enforce several civil rights statutes, only where that action was commenced and maintained to conclusion in the Federal Court. *Mid-Hudson Legal Services, Inc.* v. *G. & U. Corp.,* 578 F.2d 34, 37 (2d Cir. 1978).

In the case of *Batiste* v. *Furnco Construction Corporation,* 503 F.2d 447, reversing 350 F.Supp. 10, *cert. denied,* 95 S.Ct. 1127, 420 U.S. 928, the Court of Appeals for the 7th Circuit held that *res adjudicata* is inapplicable to

claims under the equal employment opportunities title to the Civil Rights Act of 1964, §706(c), 42 U.S.C. §2000e-5 (c), 28 U.S.C.A. §1738. In order to award counsel fees to the prevailing party, the Circuit Court in *Batiste* noted that the District Court must make its own determination based upon all of the pertinent evidence, resulting in new findings. Only then could the matter of an award of attorneys' fees to a prevailing party be considered by the District Court in its discretion. The effect of the prior dismissal of the complaint herein is tantamount to no action ever having been commenced in the Federal Court. Thereafter, the District Court lacked the power to try the issue of whether or not the discriminatory employment practice was in fact unlawful. The question of jurisdiction of the District Court may be raised at any stage of the litigation and is properly before this Court.

The Court of Appeals erroneously construed 42 U.S.C. 2000e-5(k) so as to define the words "proceedings under this subchapter" as including within their purview a New York State Administrative proceeding. However, where Congress intended in the Civil Rights Act to refer to proceedings under state or local law, Congress clearly so described them. For example, see 42 U.S.C. 2000e-5(c) subdivision (k) which appears to relate to proceedings in which the Commissioner or the United States may be a party, viz., a proceeding by the Commissioner to compel compliance with a court order in a Civil action referred to in the two preceding subdivisions, i.e., (i) and (j). See also Title 42 §1988 U.S.C.A. entitled: "Proceedings in Vindication of Civil Rights"; which equates "proceedings" with the trial and disposition by the district courts of civil and criminal matters for vindication of civil rights. There is no clear congressional intent to create a right in favor of a party who prevailed at the state or local level, to apply to a Federal court for an award of counsel fees other than in

a Federal lawsuit to enforce civil rights or in a proceeding brought by the Commissioner or the United States to enforce a court order in a civil action or criminal proceeding.

In support of the novel theory established in this case by the Court of Appeals, it cites various cases in which attorneys' fees were awarded by the courts for work done in Federal administrative proceedings. In each of those cases, the Federal employee who sought the award claimed discrimination by a Federal agency. That agency did not provide counsel for the claimant and was in fact the adversary of the complainant at all stages of the proceedings. Generally, federal agencies do not supply counsel to a Federal employee who has a discriminatory employment practice complaint against a Federal agency. However, in the case at bar, the State of New York provided her with investigational and legal representation at no cost to her. It is not in dispute that at no stage of the litigation in the New York State proceeding did any conflict of interest appear between the respondent-complainant and the New York State Division of Human Rights. The Court of Appeals relied upon the *amicus curiae* argument offered by counsel for the New York Division of Human Rights in support of the position of the respondent-claimant. That argument is based upon mere conjecture that there may be cases in which representation by counsel supplied by the Division may not be adequate for claimant. Since that argument was inapplicable to the facts herein, reliance thereon by the Court of Appeals was misplaced. The same hypothesis argued by the respondent-claimant fails for the same reason. It is not claimed that the Division at any time failed in its responsibility to her so there is no basis for the finding by the Court of Appeals of a real need on the part of the claimant to retain private counsel at the State administrative level.

The legislative intent of Title VII makes it abundantly clear that where, as here, there is adequate State protection to process these claims, the complainant must process them through the State and not resort to the Federal Government. A complainant proceeding in accordance with the intent of Congress in Title VII so construed would not result in needless litigation in the Federal courts. To hold otherwise and expand the coverage of Title VII contrary to the intent of Congress might, as Judge Werker held, lead to use of the federal courts as a procedural conduit through which otherwise unwarranted relief could be obtained, leading to massive waste of judicial and administrative resources, clearly a result to be avoided.

The Minority Opinion points to the burden which the Court of Appeals would impose on the district courts. But, let us carry that opinion one step forward. The complaint of the New York Human Rights Division on behalf of respondent Carey, charged one, Ray Angelic, with unlawful employment discrimination. Since the charges against Angelic were dismissed after the public hearing (A69, 70), he was also a "prevailing party" in the administrative proceeding. Equal protection of the law requires that the Majority Opinion—if it be allowed to stand, should be extended to Angelic (his right surpasses hers since the New York Human Rights Law provided her with cost-free counsel but gave no such protection to him). Does it not follow that he too could seek an allowance for his counsel fees to be charged against the respondent Carey by intervening in her Federal suit or by a separate action? Thus, a further burden would be imposed on the district courts which would be required to pass upon applications of persons in situations similar to that of Angelic.

We agree with Judge Mulligan that remuneration of private counsel successful in state agency and state judicial

proceedings in vindicating rights under state law should be determined by the law of the state which established the substantive right, created the agency and provided for judicial review. Judge Mulligan concluded that New York State provides full protection for the civil rights claimant; that Judge Werker properly denied the award of counsel fees to respondent; that the record in this case established that respondent's attorneys never requested, as permitted by §297(4)(a) of the New York State Human Rights Law, the right to present the case solely on behalf of the complainant with the consent of the Division.

The "American rule" is that attorneys' fees are not ordinarily recoverable by the prevailing litigant in Federal litigation, and in the absence of statutory authorization, such fees could not be awarded under a "private Attorney General" approach. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612. It follows that the award of counsel fees in Civil Rights cases is limited to the provision of the relevant statute, see §2000e-5(k) and discussion in *Parker* v. *Califano*.

42 U.S.C. §2000e-5(k) clearly does not provide for the award of counsel fees to a litigant in a State administrative proceeding who voluntarily retained the services of private counsel rather than utilize the services of counsel provided by the State.

The New York Human Rights Law and the procedure which that statute provides to carry it into effect are entirely consistent with Federal policy. They afford complete relief at the State level. There is no clear congressional intent to superimpose Federal law mandating the award of attorneys' fees for services rendered in State administrative proceedings under its Civil Rights Laws when that State has afforded adequate and comprehensive relief to eliminate unlawful discrimination in employment. The

Federal law compliments the New York State Law on the subject of civil rights in cases of alleged discriminatory employment practices by providing for a civil action in the Federal courts, if necessary, to compel compliance with the State administrative decision. In such a civil action, after trial and determination as to who is the prevailing party and the extent of his or her success, the court in its discretion may, as part of the costs, allow that party a reasonable attorneys' fee. The Federal Civil Rights Act of 1964 should not have been extended by judicial interpretation of the Court of Appeals herein to include an award of counsel fees under the circumstances of this case.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 1, 1979

APPENDIX

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Majority Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 743—August Term, 1978.

(Argued March 9, 1979 Decided May 8, 1979.)

Docket No. 78-6703

MS. CIDNI CAREY,

Plaintiff-Appellant,

v.

NEW YORK GASLIGHT CLUB, INC., and JOHN ANDERSON, Manager of the New York Gaslight Club, Inc.,

Defendants-Appellees.

Before:

SMITH, MANSFIELD and MULLIGAN,

Circuit Judges.

Appeal from denial of attorney's fees under § 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), in the Southern District of New York, Henry F. Werker, *Judge*. Opinion reported at 458 F. Supp. 79 (1978). Reversed and remanded.

JAMES I. MEYERSON (N.A.A.C.P., New York, N.Y., Nathaniel R. Jones and George E. Hairston, of counsel), *for Appellant.*

Majority Opinion of United States Court of Appeals for the Second Circuit

ADELE GRAHAM (Ann Thacher Anderson, General Counsel, State Division of Human Rights, State of New York, of counsel), *for Amicus Curiae.*

MARVIN LUBOFF (Kane, Kessler, Proujansky, Preiss & Nurnberg, P.C., New York, N.Y., Albert N. Proujansky, of counsel), *for Appellees.*

SMITH, *Circuit Judge:*

This is an appeal from dismissal by the United States District Court for the Southern District of New York, Henry F. Werker, *Judge,* of an action for attorney's fees under 42 U.S.C. § 2000e-5(k). We find error and reverse and remand for allowance of attorney's fees.

This is a case of first impression involving the right of a successful party to collect attorney's fees under Title VII of the Civil Rights Act of 1964, U.S.C. § 2000e *et seq.*, for proceedings at the state administrative level. Based on the statutory scheme of Title VII, the legislative history and public policy, we reverse the denial below of an attorney's fee award, and hold that such a successful party is entitled to counsel fees under Title VII.

Facts

Appellant Cidni Carey applied for a position as a waitress with appellee New York Gaslight Club, Inc. in 1974. She was not offered a job. Believing that she was denied a position because of her race, Carey filed a complaint with the New York office of the Equal Employment Opportunity Commission ("EEOC").

Majority Opinion of United States Court of Appeals for the Second Circuit

Carey's complaint was referred to the New York State Division of Human Rights by the EEOC, in accordance with the statutory scheme of deferring to state mechanisms for resolving discrimination charges under Title VII. 42 U.S.C. § 2000e-5(c). Carey then filed a formal complaint with the state Division of Human Rights, at that agency's request. The state agency made a finding of jurisdiction and probable cause that unlawful discrimination had taken place. After conciliation efforts had failed, Carey's case was recommended for a public hearing. A hearing was held, concluding in January, 1976.

In August, 1976 the Division of Human Rights issued an order finding that the Gaslight Club had unlawfully discriminated against Carey on the basis of her race. The Division also directed the Club to offer Carey a waitress position and to award her back pay. The Gaslight Club appealed this order to the New York State Human Rights Appeal Board, which affirmed the finding of discrimination and order for relief. This decision was also affirmed by the Appellate Division of the New York Supreme Court. 59 App. Div.2d 852, 399 N.Y.S.2d 158 (1st Dept. 1977). The New York Court of Appeals subsequently denied leave to appeal in February, 1978. 43 N.Y.2d 648, 403 N.Y.S.2d 1026 (1978).

The EEOC was not directly involved in any of the state proceedings dealing with Carey's complaint. Carey's counsel[1] communicated with the EEOC to inform that

[1] We note in passing that Appellant Carey was represented in the state proceedings and in federal court by attorneys on the staff of the National Association for the Advancement of Colored People ("N.A.A.C.P."). The fact that counsel in this case worked with a public interest organization rather than a private firm of course does not affect the application of § 706(k) of Title VII, 42

office of the course of the state proceedings. In July, 1977 Carey received a Notice of Right to Sue Letter from the EEOC. Within the statutorily required 90-day period,[2] Carey filed a suit in federal district court.

In the district court, the only issue presented by Carey was the award of attorney's fees based on her success at the state administrative level, following referral to the state agency by the EEOC. Judge Werker denied the request for attorney's fees, holding that Carey could have been represented by a state-provided attorney if she had wished, and that the filing of a federal court suit while the state administrative claim was still pending did not warrant an award of attorney's fees. For the reasons below, we reverse and remand for consideration of an award of counsel fees.

Discussion

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e *et seq.* The statute sets forth a detailed scheme of enforcement by the Equal Employment Opportunity Commission. 42 U.S.C. § 2000e-5.[3] Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), provides that

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U.S.C. § 2000e-5(k), since attorney's fees under that section are awarded to public interest lawyers in the same manner as to private attorneys. *Reynolds* v. *Coomey,* 567 F.2d 1166, 1167 (1st Cir. 1978); *Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.,* 400 F. Supp. 993, 996 (S.D.N.Y. 1975), *aff'd* 542 F.2d 579 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977).

[2] 42 U.S.C. § 2000e-5(f)(1). *See* note 3, *infra.*

[3] Pursuant to 42 U.S.C. § 2000e-5(c)-(d), a person who wishes to allege discrimination in violation of Title VII must file a

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . .

The purpose of this provision for counsel fees is to facilitate the bringing of individual complaints in order to "effectuate the congressional policy against . . . discrimination." *Johnson* v. *Georgia Highway Express,* 488 F.2d 714, 716 (5th Cir. 1974). *See also, Christianburg Garment Co.* v. *Equal Employment Opportunity Commission,* 434 U.S. 412, 418 (1978). Such a statute which provides for attorney's fees awards in civil rights cases is aimed at enforcing congressional mandates against discrimination through private actions and should be read "broadly to achieve its remedial purpose." *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.,* 578 F.2d 34, 37 (2d Cir. 1978).[4]

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complaint with his or her state or local equal opportunity agency, if such an agency empowered to "grant or seek relief" exists, before the Equal Employment Opportunity Commission may act on it. The state agency then has 60 days in which to process the complaint, after which time the complainant may file a charge with the EEOC. The EEOC then attempts to conciliate the discrimination charge, and may itself bring action against the alleged violator. If the EEOC does not conciliate or take action against the employer, the Commission issues a "Notice of Right to Sue" letter to the complainant, who may then file an action in district court within 90 days. 42 U.S.C. § 2000e-5(f).

[4] Though *Mid-Hudson Legal Services* involved the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, rather than Title VII, there are useful comparisons to be drawn between the two attorney's fees provisions. According to the Senate Report on the Civil Rights Attorney's Fees Awards Act, the language of that act "follows the language of Titles II and VII of the Civil Rights Act of 1964," 1976 U.S. Code Cong. & Ad. News 5910, and "[i]t is intended that the standards for awarding fees [in that

Though § 706(k) on its surface provides for awards of counsel fees at the court's discretion, the policy developed by the Supreme Court favors awards of fees to successful plaintiffs unless there are special circumstances which would render such an award unjust. *See Christianburg Garment Co., supra,* 434 U.S. at 416-17. This approach stems from a recognition that it is in the public interest to aid Title VII enforcement through private actions, and a liberal reading of the attorney's fees provision encourages this effort. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975), *citing Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968) (per curiam), *and Northcross* v. *Memphis Board of Education,* 412 U.S. 427 (1973) (per curiam). *Accord Rios* v. *Enterprise Association Steamfitters Local 638 of U.A.,* 400 F. Supp. 993, 995 (S.D.N.Y. 1975), *aff'd* 542 F.2d 579 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977).

The issue in this case, then, is whether the general policy of awarding attorney's fees to successful plaintiffs in Title VII actions envisions an award to a party who is successful in pursuing her claim before the state human rights agency without having to pursue her case in federal court. There is no real question that Carey prevailed on the merits before the Division of Human Rights.[5] The question is whether § 706(k) encompasses fee awards to complaining parties who succeed at a step in the statutory scheme before they are forced to litigate their claims in federal court.

Deference to state mechanisms for resolving discrimination complaints is an integral part of the enforcement

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Act] be generally the same as under the fee provisions of the 1964 Civil Rights Act." *Id.,* at 5912.

[5] *See Foster* v. *Boorstin,* 561 F.2d 340, 342-43 (D.C. Cir. 1977).

process under Title VII, 42 U.S.C. § 2000e-5(c), and submission to state remedies is a jurisdictional prerequisite to EEOC action. *See Equal Employment Opportunity Commission* v. *Union Bank,* 408 F.2d 867, 869 (9th Cir. 1968). The statutory framework of Title VII embodies a "federal mandate of accomodation to state action." *Voutsis* v. *Union Carbide Corp.,* 452 F.2d 889, 892 (2d Cir. 1971), *cert. denied,* 406 U.S. 918 (1972). Thus, there can be concurrent jurisdiction over a complaint by the EEOC and the state agency, *Voutsis, supra,* 452 F.2d at 892. In addition, oral referral to a state agency of a complaint filed with the EEOC acts to place the complaint in "suspended animation" until the state has terminated proceedings and "fully complie[s] with the intent" of Title VII. *Love* v. *Pullman Co.,* 404 U.S. 522, 525-6 (1972).

As explained in *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 44 (1974), the enforcement procedures in Title VII were designed to

> assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. (Citations omitted.)

Thus, state human rights agencies play an important role in the enforcement process of Title VII, since they afford a chance to resolve a discrimination complaint in accordance with federal policy before such a complaint reaches the federal courts.

The language of § 706(k) refers to attorney's fees awards in "any action or proceeding under this subchapter." The subchapter does include the description of deferral to state agencies by the EEOC, and uses the term "proceeding" to describe the state processes. 42 U.S.C. § 2000e-5(c). In light of this, and in light of the use of both "action" and "proceeding" in § 706(k),[6] the language of the statute is broad enough to encompass awards of counsel fees for work done in connection with administrative proceedings following referral to a state agency by EEOC.[7]

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[6] Statutes should be interpreted whenever possible so as not to render any clause, sentence or word superfluous or redundant. *Rockbridge* v. *Lincoln*, 449 F.2d 567, 571 (9th Cir. 1971).

[7] The legislative history of § 706(k) is not particularly enlightening as to the meaning of "action" or "proceeding." *See* Appendix in *Parker* v. *Califano*, 561 F.2d 320, 333 (D.C. Cir. 1977). It is true, however, that the attorney's fees provision was left untouched during the 1972 amendment process to Title VII. Additionally, the legislative history of the enforcement scheme embodied in § 706 talks favorably of the need for administrative tribunals to resolve discrimination complaints, and refers to state fair employment practice commissions as well as federal agencies in this regard. 1972 U.S. Code Cong. & Ad. News 2145-47.

The legislative history of the 1976 Civil Rights Attorney's Fees Awards Act (see note 4, *supra*) also notes that a prevailing party need not have succeeded in a courtroom context to obtain compensation for counsel fees:

> [F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. 1976 U.S. Code Cong. & Ad. News 5912.

Other circuits favor a broad reading of the attorney's fees provisions of Title VII to include compensation for work done in administrative proceedings. *Fischer* v. *Adams*, 572 F.2d 406 (1st Cir. 1978); *Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977); *Foster* v. *Boorstin*, 561 F.2d 340 (D.C. Cir. 1977). *Accord*, *Noble* v. *Claytor*, 448 F. Supp. 1242 (D.D.C. 1978); *Smith* v. *Califano*, 446 F. Supp. 530 (D.D.C. 1978); *McMullen* v. *Warner*, 416 F. Supp. 1163 (D.D.C. 1976). While these cases deal with federal employees involved in federal agency procedures, their reasoning supports a similarly favorable result for complainants who succeed in state administrative proceedings pursuant to Title VII.[8]

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[8] In *Parker* v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977), Judge Wright examines the legislative history and statutory framework of Title VII and concludes that a federal district court has authority to award attorney's fees that include compensation for work done in related administrative proceedings. In discussing the statutory language of § 706(k), which is incorporated into § 717 of Title VII dealing with complaints filed by federal employees, he notes the observation in *Johnson* v. *United States*, D.Md. Civil Action H-74-1343 (June 8, 1976) slip op. at 7, *aff'd* 554 F.2d 632 (4th Cir. 1977):

> Had Congress wished to restrict an award of an attorney's fee to only suits filed in court, there would have been no need to add the words "or proceeding" to "any action." But "proceeding" is a broader term than "action" and would include an administrative as well as judicial proceeding. 561 F.2d at 325.

The court in *Parker* goes on to hold that the general enforcement scheme of Title VII would be "seriously impinge[d]" upon by a narrow interpretation of the attorney's fees provision which would preclude compensation for work done on the administrative level. Such an approach to the award of attorney's fees under Title VII

> clashes sharply with the clearly perceived structure and aims of the Title. From the passage of the Civil Rights Act of 1964, the Title VII enforcement scheme has included both

While the complaint resolution process may be factually different for federal complainants than for private employees, the policy reasons for allowing attorney's fees awards for work done on the administrative level are similar for federal and private employees who claim discrimination in violation of Title VII.

First, the fact that the opposing party in an administrative hearing will most likely be represented by an attorney is as true in the case of an individual filing a charge against a private employer as it is in the case of a federal employee. *See Parker* v. *Califano, supra,* 561 F.2d at 332. In the case of a private employer, the disadvantage at which an individual employee who is not represented by counsel would be placed in a state administrative hearing is potentially every bit as great as that of a federal employee confronting a United States agency.

Judge Werker ruled below that the need to award attorney's fees in the case of private individuals was not as pressing as in the case of federal employees, since a private complainant appearing before the New York Division of Human Rights could have the option of being represented by counsel provided by the Division. In this regard, he cited § 297(4)(a) of the New York Executive Law (Human Rights), McKinney 1972, which provides that the "case in support of the complaint shall be presented by one of the attorneys or agents of the [D]ivision."

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administrative proceedings and judicial actions. 561 F.2d at 331.

Therefore, according to this analysis, the provision for attorney's fees should be read to include both phases of the enforcement process.

We disagree with this conclusion. A brief filed before this court by the New York Division of Human Rights as *amicus curiae* points out that the statute provides for Division lawyers to present the case "in support of the complaint," not in support of the plaintiff. Thus, there may be cases in which the position of the Division lawyer is not the same as that of the complaining party. In addition, as noted by the Division, state attorneys are available to represent complaining parties only at the public hearing stage of the administrative process. In the earlier investigative stage no Division attorney is provided to represent a private employee and in the later appellate stage a Division attorney, if one appears, does so as an advocate of the decision rendered by the New York State Division of Human Rights or of the Appeal Board, which may have denied the employee's claim or granted less relief than the complainant sought.

The need to retain private counsel at the state administrative stage in a Title VII claim is therefore real. If no counsel is present to represent a complainant at the investigative stage, her complaint may never receive a public hearing because there may be no finding of probable cause or jurisdiction. And if a plaintiff cannot obtain representation at the appellate stage, she may be deprived of review of her claim, and may be forced to pursue her case in federal court even where a resolution through state mechanisms might be possible.[9]

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[9] Despite the implications of the dissent, the productive role played by private counsel is apparent in this case. First, as admitted by the dissent, no Division counsel participated in the initial hearing on Carey's case before the New York State Division of Human Rights. It is precisely at this first stage that a case charging discrimination may be won or lost, since it is at this

Second, denial of awards of attorney's fees for administrative proceedings may encourage needless litigation.[10] As noted in *Smith* v. *Califano, supra,* 446 F. Supp. at 534:

> a party who knew he could recover all fees once he got to court but would recover none if he prevailed at the administrative level would rush to court . . . rather than wait for a final agency decision. . . . Thus, the administrative proceeding [required by Title VII]

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stage that a fact-finder develops findings which will be given great deference at later stages of the litigation. We do not agree with the dissent's suggestion that Carey should have waited to see if the Division attorney could win her case for her before retaining private counsel. If the complainant had lost in the initial hearing stage, she might have been in the position of having the Division attorney represent the *defendants* against whom she brought the complaint in later proceedings, as the prevailing party below. The establishment of a favorable record in the initial stage is crucial, and so plaintiffs should not be penalized for wishing to obtain representation through retained counsel from the beginning of the proceedings.

The record also supports the conclusion that it was Carey's retained counsel, and not the Division attorney, who pressed her case at all levels. In various orders and records of the proceedings, it was noted that retained counsel represented Complainant Carey, while Division attorneys represented "the Division" (Order of Commissioner Kramarsky, August 13, 1976), "the Commissioner's Order" (Order of State Human Rights Appeal Board, August 26, 1977) and "the State Division" (Order of Appellate Division of New York Supreme Court).

Additionally, there is no evidence to contradict the affidavit of retained counsel that he was "almost solely responsible for the prosecution and preparation of the state administrative and judicial proceedings, on behalf of the Plaintiff." Given these facts, we cannot agree with the dissent that the function served by retained counsel was in any way superfluous or unnecessary.

[10] Acts awarding attorney's fees should not be interpreted so as to "encourage plaintiffs to try cases in which reasonable settlement offers have been received, merely to ensure a fee award." *Gagne* v. *Maher,* —— F.2d ——, slip op. at 1603 (2d Cir., March 9, 1979).

> might be relegated to a pro forma exhaustion step decreasing the likelihood that claims could be resolved without resorting to the courts.

Awards of attorney's fees for administrative work furthers the congressional policy of resolving discrimination complaints before they reach the federal courts just as effectively in cases involving state agencies as in those involving federal agencies. Given the compromise worked out by Congress to provide some deference to state dispute resolution mechanisms, *see Voutsis* v. *Union Carbide Corp., supra,* 452 F.2d at 891-92, an interpretation of the attorney's fees provision which favors parties who are successful in state administrative proceedings to the same extent as those who prevail in court is consistent with the legislative intent just as is allowing counsel fees in the context of federal administrative proceedings.

Finally, the importance of providing an incentive for a a complete development of the administrative record is as relevant to state administrative proceedings as to federal ones. *See Smith* v. *Califano, supra,* 446 F. Supp. at 534. If a complaining party is reluctant to present her case fully before a state agency for fear that success at that level would deprive her of an attorney's fee award, the federal courts will not have the benefit of a complete record below when reviewing the case. Thus, courts will have to expend time and energy which might be unnecessary if plaintiffs had an incentive to develop a full administrative record.

The cases cited by appellees for the proposition that attorney's fees under Title VII may be awarded only for success in a courtroom context are not applicable to the case at bar. Neither *Pearson* v. *Western Electric Co.,* 542

F.2d 1150 (10th Cir. 1976), nor *Williams* v. *General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974), deals with a party who prevailed in administrative proceedings undertaken pursuant to the requirements of Title VII. To the extent that the language of those cases limits recovery of attorney's fees under Title VII to parties who succeed in a court, it is inconsistent with the reasoning of the cases we have cited in the area and we decline to adopt that limitation. *See Fischer* v. *Adams, supra* 572 F.2d 406; *Parker* v. *Califano, supra,* and cases cited therein, 561 F.2d at 324 n. 13; *Drew* v. *Liberty Mutual Insurance Co.*, 480 F.2d 69 (5th Cir. 1973), *cert. denied,* 417 U.S. 935 (1974).

A complaining party who is successful in state administrative proceedings after having her complaint under Title VII referred to a state agency in accordance with the statutory scheme of that Title is entitled to recover attorney's fees in the same manner as a party who prevails in federal court. We reverse and remand for further proceedings not inconsistent with this opinion.

Dissenting Opinion of Circuit Judge William H. Mulligan

MULLIGAN, *Circuit Judge,* dissenting:

The majority concedes that its holding is without precedent. The appellant successfully established employment discrimination on the basis of race and color in violation of the New York State Human Rights Law in state agency administrative proceedings where she was provided legal counsel in support of her complaint. She is now permitted to recover attorney's fees for additional legal counsel whom she privately retained for those proceedings. The fee recovery is permitted in a federal action where the only issue presented to the district court is the propriety of an award of such fees.[1] Remarkably, the decision is in part justified by the majority on the ground that it will discourage needless litigation. I respectfully dissent.

Title VII mandated that the initial complaint made by Ms. Carey to the Equal Employment Opportunity Commission (EEOC) be referred to the New York State Division of Human Rights (the Division). 42 U.S.C. § 2000e-5(c). I agree with the majority that the clear congressional purpose underlying that mandatory referral was to utilize existing state and local equal opportunity agencies in order to settle such disputes at the state level before involving the federal courts. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Love* v. *Pullman Co.*,

[1] The majority speaks of this as an action to recover attorney's fees "at the state administrative level." However, the affidavit of counsel seeks 16 hours ($1600) for appearances in the appellate courts of New York. Of the total of 82 hours expended counsel seeks recompense for some 22 hours for the preparation of memoranda and affidavits in support of the application for attorney's fees.

404 U.S. 522, 526 (1972). In this case the Division investigated the charge of the complainant, made a finding and determination of probable cause and conducted a public hearing. Carey was successful on the merits, winning an award of compensatory damages based on back pay as well as an order directing that she be employed. The employer appealed to the State Human Rights Appeal Board which sustained the order of the agency. The Appellate Division affirmed and the New York Court of Appeals refused leave to appeal as set forth in the majority opinion. We note that the discrimination found by the agency and sustained by the courts of New York was a violation of the New York Human Rights Law. N.Y. Executive Law, Article 15 (McKinney's 1972).

It seems to me to be fundamental that remuneration of private counsel successful in state agency and state judicial proceedings in vindicating rights under state law should be determined by the law of the state which established the substantive right, created the agency, and provided for judicial review. The State of New York has hardly been indifferent to the evil of racial discrimination in employment. Its relevant remedial procedures predated Title VII by nearly 20 years and are derived from legal antecedents enacted as early as 1909. See N.Y. Executive Law (Human Rights Law) § 297, historical note at 305-06 (McKinney's 1972). It is true that the State of New York has made no statutory provision for recovery of private counsel fees in these cases and it is not disputed that no such award is judicially sanctioned in that State. *State Division of Human Rights* v. *Gorton,* 32 A.D. 2d 933, 302 N.Y.S. 2d 966 (2d Dep't 1969). Nevertheless, New York has devised a procedure to satisfy the complainant's need

for counsel in an employment discrimination action. Section 297(4)(a) of the Human Rights Law provides in pertinent part:

> The case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney. With the consent of the division, the case in support of the complainant may be presented solely by his attorney.

The complainant here was without funds to pay for counsel and retained the services of attorneys employed by the N.A.A.C.P. Special Contribution Fund, Inc. There is nothing in the record before us to indicate any request by these attorneys to present the case solely on behalf of the complainant with the consent of the Division as permitted by the last sentence quoted in section 297(4)(a). The record establishes that the Division assigned an investigator to look into the charges. The Division subsequently found that jurisdiction existed and that there was probable cause to believe that the employer had engaged in an unlawful discriminatory practice in violation of the Human Rights Law. At the ensuing public hearing the complainant was represented by her privately retained attorney and the Division by one of its counsel.[2] On the appeal the complainant was again privately represented and again the Division provided counsel who argued and

[2] The Division attorney admittedly was not active in assisting the presentation of Carey's case at this stage of the proceeding. This occurred, however, because of Carey's voluntary decision to retain independent counsel to handle that presentation. See 9 N.Y.C.R.R. § 465.11.

submitted a brief on Carey's behalf. In all subsequent state legal proceedings this dual representation continued. There is not the slightest hint in the record that at any point the interest of the Division in successful prosecution of the complaint diverged from Carey's interests as complainant. On these facts I believe Judge Werker properly denied an award of counsel fees to the appellant.

I continue to adhere to the view I expressed in *Mid-Hudson Legal Services, Inc.* v. *G. & U. Corp.*, 578 F.2d 34, 37 (2d Cir. 1978), that attorneys who are acting as "private attorneys general" in the civil rights field should receive reasonable compensation for their services. In that case we were construing the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, which explicitly authorizes the district court in its discretion to award reasonable attorney's fees as part of the cost of bringing an action to enforce any of several civil rights statutes. See 578 F.2d at 36 & n.1. The action there was commenced in the federal court and the fees to be awarded involved services performed in a federal tribunal. Here the only federal court procedure involved is the instant action. This suit raises only the issue of counsel fees to be awarded in *state* administrative and judicial proceedings which granted the complainant the full relief requested and which made no provision for compensation for private counsel, presumably because the governing statutory scheme provided state counsel at no expense. Thus, I cannot sensibly characterize these private counsel as private attorneys general whose efforts must be subsidized by defendants in order to encourage plaintiffs injured by racial discrimination to seek legal relief. Compare, e.g., *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968).

Title VII does provide that:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 2000e-5(k). The complainant here, however, prevailed not in a Title VII proceeding within the federal remedial framework, but rather in a state agency proceeding which provides agency counsel at no expense to the complainant and makes no provision for the compensation of private counsel. Since Congress insisted in Title VII that existing state agency procedures be utilized and New York had followed its procedure long before enactment of the federal scheme, I cannot find in the language or legislative history of Title VII any intent to permit the federal courts to be utilized in connection with such state proceedings merely as a fee dispensing agency. Such a course only promotes the federal litigation which Congress intended to bypass. Had the Congress intended this unusual result —the awarding by federal courts of attorney's fees not incurred in the federal framework—it could and surely would have explicitly so provided.

The majority argues that the need to retain private counsel at the state level is "real." However, the proper response to that need is a matter for the state legislature to determine, not the federal courts. Moreover, whatever the need for private counsel may be in certain situations, none of the alleged inadequacies in the state approach noted by the majority are present in this case. The majority notes that in the investigative stage no Division attorney is assigned to represent a private employee. However, a Divi-

sion investigator was assigned here and a finding of probable cause was made. There was no suggestion by Carey of any inadequacy in the Division's handling of the investigation. As able private counsel admits in his affidavit of services, "the fact patten herein was concededly simpler than many of those matters which I otherwise undertake and handle." Indeed, no claim is made in that affidavit for time expended by private counsel in making *any* investigation.

At the appellate level before the Human Rights Appeal Board and the state courts, the majority finds that a Division attorney, "if one appears," acts as an "advocate of the decision rendered" by the Division or the Appeal Board "which may have denied the employee's claim or granted less relief than the complainant sought." Majority opinion at 8. But the Division attorney in this case *did* appear at all these stages and the Division *did* award the complainant all the relief sought.[3] The nebulous distinction made between representation of the complaint and representation of the complainant[4] is non-existent here since the interests

[3] The initial complaint sought relief not only against the Gaslight Club but its manager and assistant manager as well. Since the assistant manager did recommend Carey for the position of cocktail waitress, the Division found no violation of law on his part. However, complainant did not appeal that determination and makes no claim now that relief should be granted as to him.

[4] Whether the language of section 297(4)(a) actually supports this dichotomy between the Division's prosecution of the complaint and a private counsel's presentation on behalf of the complainant seems at least open to some question. For example, the section states: "With the consent of the division the case in support of the complainant may be presented *solely* by his attorney." This sentence can be read to imply that absent such consent the statute anticipates joint representation on the complainant's behalf by the Division as well as private counsel. I do not believe it necessary, however, to quibble with the construction of the statute suggested by the Division and accepted by the majority.

of the Division and of Carey remained identical throughout the state proceedings once the finding of probable cause was made.[5] The New York State Human Rights Appeal Board was a respondent in the New York State court proceedings and since its findings and determination coincided precisely with those sought by the complainant, no need for private counsel has been demonstrated.[6]

The majority also argues that the denial of awards of attorney's fees in state proceedings may encourage needless federal litigation under Title VII. This claim is not persuasive. The majority decision is the first ever to sanction as award by a federal court for attorney's fees earned in a state action. It obviously can only promote litigation in the federal courts, where district judges are already inundated with calendars of increasing weight and complexity.[7]

[5] The continuing solicitude of the Division for the complainant is demonstrated by its filing of an *amicus* brief in this court for the purpose of explaining the pertinent New York law. While this agency, like other state and federal agencies, may well be undermanned, the appropriate remedy for such a problem is state legislative action rather than an unprecedented decision which permits private representation to be determined by the federal courts even absent a showing of need for such representation in a particular case.

[6] The majority argues in footnote 9 that the absence of a Division attorney at the initial hearing establishes the need for the retention of private counsel. However, it was that voluntary retention that created the absence which is now relied upon to establish inadequate state representation. See note 2, *supra*. The amicus brief here points out that a Division attorney does appear at the hearing "if the complainant has not retained private counsel; if the complainant has retained private counsel the Division attorney appears at the Division's option to protect the public interest."

[7] The *amicus* brief submitted by the Division states that in 1977 it was forced to reassess and restructure the allocation of Division attorneys. This step was necessary because of severe case backlogs

Dissenting Opinion of Circuit Judge William H. Mulligan

To require these district courts to fix counsel fees in state actions when the burden of representation has been shared by counsel provided by the state at no cost to the complainant is particularly onerous.[8]

The position of the majority is ostensibly bolstered by two considerations which are not convincing. First, we are told that if a party knew he could recover attorney's fees once he got to a federal proceeding but could recover none if he prevailed at the state administrative level, there would be a precipitate rush to the federal forum. However, the Civil Rights Law of 1964, as we have seen, mandates recourse to the state agency. 42 U.S.C. § 2000e-5(c). The fact that state law has no provision for awarding fees for private counsel in such an action is no ground for circumventing the statutory deferral to the state agency before pursuing a federal remedy. Appellant here has in fact argued at length in her brief that attempts to gain premature access to the federal courts have not been looked upon with favor. In analogous situations where the state action has not yet been resolved the district court has

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resulting from a doubling and redoubling of the Division caseload since 1970. In view of the majority's holding it cannot be gainsaid that a large percentage of these proliferating state actions will now be followed by suits initiated in federal district courts simply to recover attorney's fees unobtainable in the state proceeding.

[8] The majority claims to find support for its position in cases such as *Fischer* v. *Adams*, 572 F.2d 406 (1st Cir. 1978), *Parker* v. *Califano*, 561 F.2d 340 (D.C. Cir. 1977) and *Foster* v. *Boorstin*, 561 F.2d 340 (D.C. Cir. 1977). See majority opinion at 6-7. But in those cases, as even the majority acknowledges, a federal court was reviewing federal agency action and adjudicating alleged violations of federal law. Moreover, unlike the State of New York, the federal agency did not ensure the assistance of counsel to complainants in proceedings before it. Therefore, the majority's reliance on these cases is misplaced.

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placed the Title VII complaint on the suspended calendar pending resolution of the state proceedings. See *Schudtz* v. *Dean Witter & Co., Inc.*, 418 F. Supp. 14, 18-19 (S.D.N.Y. 1976). Cf. *Rios* v. *Enterprise Association Steamfitters Local No. 638*, 326 F. Supp. 198, 203-04 (S.D.N.Y. 1971).

The majority suggests, however, that a complainant might be reluctant to present a case fully before a state agency "for fear that success at that level would deprive her of an attorney's fee award." This tactic, observes the majority, would deprive the federal courts of the benefit of a complete record when reviewing the case. I submit that this is not realistic. The person who is the victim of job discrimination because of race or color and is concerned enough to file a complaint with a state agency is not likely to jeopardize the vindication of basic civil rights by failing to present a complete case at that level. Moreover, the complainant in New York is represented, as we have indicated, by state counsel who are fully experienced in the field. If further private counsel is retained it would obviously be unprofessional and unethical to provide less than full service at the administrative level because success at that level might foreclose an award of fees by a federal court. Attorneys who have specialized in the civil rights field are zealous and dedicated. Their performance will not be affected by this decision one way or the other.

For these reasons I would affirm the dismissal of the complaint.

Memorandum Decision of Henry F. Werker, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794 (HFW)

No. 47641

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

APPEARANCES (See last page):

HENRY F. WERKER, *D.J.*

The plaintiff in this employment discrimination action brought pursuant to the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, was awarded back pay and an offer of a position as a cocktail waitress in defendants' club after prevailing in a state administrative proceeding and upon appellate review by the state courts. The complaint was initially filed with the federal Equal Opportunity Employment Commission (EEOC) but that agency referred the matter to the New York State Division of Human Rights (Division) pursuant to 42 U.S.C. § 2000e-5(c). The plaintiff now moves for an award of attorneys' fees in this suit which was commenced before the remedies provided for under state law had been exhausted.[1] Since all of the relief

[1] The state procedures are set forth in the New York Human Rights Law which is found in Article 1 of the New York Executive Law, § 290 *et seq.* (McKinney 1972-1977 Supp.). Briefly a party claiming to be aggrieved by a discriminatory employment practice may file a verified complaint with the Division. *Id.* § 297(1). After a preliminary investigation the Division determines whether it has jurisdiction to hear the matter and if so whether there is probable cause to believe that an unlawful practice has existed or continues to exist. *Id.* § 297(2). Assuming that it finds probable cause the Division may direct the respondent or respondents to answer the charges at a public hearing before a hearing examiner. *Id.* § 297(4)(a). At such a hearing the complainant's case is presented by an attorney for the Division or at the complainant's option by privately retained counsel. *Id.* Adverse determinations may be appealed to the New York State Human Rights Appeal Board (Appeal Board), *id.* § 297-a, and thereafter to the Appellate Division of the New York State Supreme Court and possibly the New York Court of Appeals. *Id.* § 298.

Making use of the state administrative remedies generally precludes a complainant from bringing an employment discrimination suit in state court. *Id.* § 297(9).

requested by the plaintiff with the exception of attorneys' fees was awarded in the state forum the issue presented is whether the plaintiff is entitled to those fees simply because a parallel federal court action was filed after the EEOC impliedly reassumed jurisdiction over the matter and issued a "right to sue letter."

BACKGROUND

The relevant facts are not involved. At the request of the Division the plaintiff filed a verified complaint in February of 1975. The Division thereafter determined that it had jurisdiction over the matter and that probable cause existed to believe that the Human Rights Law had been violated. In May of 1975 plaintiff's counsel wrote to the EEOC and asked that it "reassume jurisdiction . . . so that . . . [the plaintiff could] obtain a Right to Sue letter *at an appropriate time in the future.*" (Emphasis added.) The Division subsequently held a hearing on the matter and issued a decision and order on August 13, 1976. Between

that date and August 26, 1977 when the Appeal Board affirmed the decision below plaintiff's counsel had a series of telephone conversations with and sent certain documents to the EEOC District Office. These communications took place over a period from May 22, 1975 to on or about November 13, 1976 and prompted the District Office to notify the plaintiff by letter that EEOC had decided not to litigate her case. The District Office letter was received by the plaintiff on July 13, 1977 and contained a right to sue letter. The plaintiff therefore filed the instant action within ninety days as is required by 42 U.S.C. § 2000e-5(f)(1). On November 3, 1977 the Appellate Division, First Department, unanimously affirmed the administrative determinations and on February 14, 1978 the New York Court of Appeals denied the defendants leave to appeal.

DISCUSSION

Although plaintiff's counsel merely asked the EEOC to reassume jurisdiction as a preparatory measure, the District Office of the EEOC went beyond that narrow request and issued a right to sue letter while the state proceedings were still pending. The appropriateness of that action is in my view very doubtful; particularly so when the EEOC had an alternative of awaiting the conclusion of the state administrative and judicial proceedings.

By acting as it did the EEOC placed the plaintiff in a position where she had no option but to preserve her rights by filing a complaint in federal court. However, while it appears that the pendency of related employment discrimination actions in both state and federal courts is now a sanctioned practice, *see Voutis* v. *Union Carbide Corp.*, 452 F.2d 889, 893-94 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972), it by no means follows that the mere filing of a

federal suit should serve to entitle an aggrieved party to attorneys' fees. And under the circumstances of this case I conclude that it does not.

The plaintiff had the option of pursuing her state administrative remedies without incurring any expense at all for legal services since section 297 of the New York Human Rights Law provides that the "case in support of the complaint shall be presented by one of the attorneys or agents of the [D]ivision." Rather than availing herself of such free representation the plaintiff chose to be represented by privately retained counsel. However, because neither she nor her attorneys could have foreseen that there would be a need to file a separate federal court action it is clear that they could not have expected that the defendants would ever be required to shoulder the costs of representing her in the state forum. Consequently I see no reason why they should now be given a windfall simply because the EEOC acted precipitously. In this connection I note that any other solution might lead to use of the federal courts as a procedural conduit through which otherwise unwarranted relief could be obtained. This would lead to massive waste of judicial and administrative resources and is clearly a result to be avoided.

Parker v. *Califano*, 561 F.2d 320 (D.C. Cir. 1977), which is cited by the plaintiff is in my opinion inapposite. That case involved a claim of discrimination by an employee of a federal agency. There is an administrative and judicial enforcement mechanism for such claims pursuant to section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, but unlike the provisions governing suits against private employers those controlling suits by federal employees do not provide for the complainant to be represented by attorneys or agents employed by the government.

Memorandum Decision of Henry F. Werker, D.J.

Therefore the complainant in *Parker* (unlike the plaintiff in this action) had no alternative but to retain counsel. In such circumstances I agree that an award of attorneys' fees is appropriate; under the facts of this case I do not.

The application for fees is consequently denied.

So Ordered.

Dated: New York, New York
September 15, 1978

/s/ Henry F. Werker
U.S.D.J.

Complaint—United States District Court for the Southern District of New York

In the

UNITED STATES DISTRICT COURT

For the Southern District of New York

77 Civ. 4794

Ms. Cidni Carey,

Plaintiff,

vs

New York Gaslight Club, Inc. and John Anderson, Manager of the New York Gaslight Club, Inc.,

Defendants.

Introduction

1. This is a proceeding for relief against the racially discriminatory policies and practices being carried on by the Defendants herein named which resulted in the arbitrary and racially discriminatory refusal by the Defendants to hire the Plaintiff for an evening cocktail waitress position in the New York Gaslight Club, Inc. The Plaintiff seeks redress for the violation of her constitutional, civil and statutory rights.

Jurisdiction

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331 and 1343 in conjunction with the Civil Rights Act of 1866 (42 U.S.C. Section 1981) and the Thirteenth Amendment to the United States Constitution.

In addition, jurisdiction is invoked in conjunction with Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. Section 2000 (e) *et seq.*), the Plaintiff having received a Notice of Right to Sue Letter from the Equal Employment Opportunity Commission on July 13, 1977 and having filed this Complaint, per said letter, within 90 days thereafter. Jurisdiction is also invoked in conjunction with 28 U.S.C. Sections 2201 and 2202 this action seeking declaratory as well as injunctive and monetary relief.

PARTIES

3. Cidni Carey, the Plaintiff, is a Black female citizen of the United States who resides in the City of New York, County of Queens, State of New York.

4. The New York Gaslight Club, Inc. is located at 124 East 56th Street, New York, New York. It has operated since approximately 1956 and provides restaurant services in a night club type atmosphere to a private key club membership. The New York Gaslight Club, Inc. is a subsidiary corporation of a Delaware Corporation and is one of several such subsidiary corporations.

5. John Anderson is presently manager of the New York Gaslight Club, Inc. and was, at the time that the Plaintiff sought employment with said Club, manager thereof.

ALLEGATIONS

6. On or about August 26, 1974 Plaintiff went to the Gaslight Club for the purposes of applying for a position as an evening waitress, the Plaintiff having called said Club and been advised that positions were available and to

come to said Club and ask for Mr. Anderson when she arrived thereat.

7. When the Plaintiff first called and spoke with the New York Gaslight Club she was asked if she could sing and dance and Plaintiff replied in the affirmative.

8. The Plaintiff previously was employed as a Playboy Club bunny where she was required to sing and dance, among other of her duties. In addition, the Plaintiff has been employed as an actress on two television soap operas.

9. The Plaintiff did go to the New York Gaslight Club as it was requested of her.

10. Upon her arrival at the Club she was advised by Mr. Anderson to go upstairs where she would be interviewed with respect to her singing ability. Thereupon, the Plaintiff did proceed upstairs where she engaged with the piano player in the rendition of the same song about three times. Mr. Ray Angelic, a former opera singer, who initially interviewed an applicant for appearance and singing and dancing ability, listened to the Plaintiff and was satisfied with both her appearance and her singing ability. He took down pertinent information and inquired of her whether she had ever held similar type work theretofore (the Plaintiff indicating, in response, that she had been employed by the Playboy Club).

11. On the same date a white person was hired as a cigarette salesperson although said individual had been interviewed for a waitress position. Furthermore, said white individual had been advised of the existence of the cigarette salesperson position whereas the Plaintiff had not been so advised.

12. Notwithstanding that the Plaintiff sought a waitress position, she was never called relative to the same although several such positions became available after she interviewed including a couple almost immediately thereafter and although said employees of the New York Gaslight Club, Inc. were supposedly under directives from management to affirmatively seek out and hire Black persons as waitresses.

13. During the almost twenty one years of its existence, it is believed that the New York Gaslight Club, Inc. has employed only perhaps four Black persons as waitresses (out of the perhaps thousands of persons employed during that period in that position), one of whom was employed after the Plaintiff filed a Complaint with the New York State Division of Human Rights in 1975, challenging the refusal by the New York Gaslight Club, Inc. to hire the Plaintiff in August, 1974 or thereafter notwithstanding the existence of waitress positions.

14. As of February, 1976, the Gaslight Club, Inc. employed only approximately five Black employees out of a total employee force of approximately eighty persons; and said Black employees included several musicians and several persons in the kitchen. Save for perhaps two waiters, the New York Gaslight Club, Inc. has virtually no Black employees in visible positions. The New York Gaslight Club, Inc. has no Black employees in management positions or on its Board of Directors.

15. In February, 1975, the Plaintiff filed a Complaint with the New York State Division of Human Rights challenging the New York Gaslight Club's refusal to hire her. Those proceedings continue to date with the New York

Gaslight Club, Inc. now seeking review of the Division Order, as affirmed by the New York State Human Rights Appeal Board, which Order found that the New York Gaslight Club, Inc. had violated the Human Rights Law of the State of New York. Said review is now being sought pursuant to a special proceeding in the Supreme Court, Appellate Division—First Department.

16. The plaintiff, by background and otherwise, is a highly competent person to be employed as a waitress at the Gaslight Club, Inc. in New York. As previously noted, the Assistant Manager of the New York Gaslight Club, Inc., Mr. Ray Angelic, himself, found the Plaintiff's singing ability and appearance satisfactory for employment with and by the New York Gaslight Club, Inc.

17. It is not believed that Mr. John Anderson, then the Manager of the New York Gaslight Club, Inc. and the person responsible for hiring individuals, interviewed the Plaintiff.

18. The refusal of the New York Gaslight Club, Inc. to employ the Plaintiff as a waitress was arbitrary, capricious and racially discriminatory and violative of the Plaintiff's rights as guaranteed by the Thirteenth Amendment to the United States Constitution and the Civil Rights Acts of 1871 and 1964, as amended (42 U.S.C. Section 1981 and 42 U.S.C. Section 2000 (e) *et seq.*).

WHEREFORE, Plaintiff respectfully prays that this Court assume jurisdiction of this cause, set the matter down for hearing, and:

Complaint—United States District Court for the Southern District of New York

1. Declare the actions, inaction, policies and practices of the Defendants, as challenged herein, to be arbitrary, capricious and racially discriminatory.

2. Declare the refusal of the Defendants to hire the Plaintiff as arbitrary, capricious, and racially discriminatory and violative of her rights as guaranteed by the Thirteenth Amendment to the United States Constitution and the Civil Rights Acts of 1871 and 1964, as amended (42 U.S.C. Section 1981 and 42 U.S.C. Section 2000 (e) *et seq.*).

3. Require the Defendants to hire the Plaintiff to a position in said Club with all benefits attendant thereto, including the accrual of all monetary and other benefits which she would have obtained if she had been hired in August, 1974 when she applied for a position.

4. Award the Plaintiff back pay with interest.

5. Award the Plaintiff costs and attorneys fees.

6. Award the Plaintiff such other and further relief as the Court deems just and reasonable.

Respectfully submitted,

NATHANIEL R. JONES, ESQ.
GEORGE E. HAIRSTON, ESQ.
JAMES I. MEYERSON, ESQ.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100
Attorneys for Plaintiff

By: JAMES I. MEYERSON

Order of Henry F. Werker, *D.J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794 (HFW)

MS. CIDNI CAREY,

Plaintiff,

—v—

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

ORDER

HENRY F. WERKER, *D.J.*

The New York State Division of Human Rights having directed that the defendant club offer plaintiff a position as a waitress and having made an award of back pay, and

All possible appeals from that decision having been exhausted after the filing of this action,

It is hereby ORDERED that the complaint in the instant action be dismissed and the case forthwith marked off the calendar.

So ORDERED.

July 27, 1978

/s/ HENRY F. WERKER,
U.S.D.J.

FILED
U. S. DISTRICT COURT
S.D. OF N.Y.
JUL 27 1978

Affidavit of James I. Meyerson in Support of Application for Attorneys Fees

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794

MS. CIDNI CAREY,

Plaintiff,

VS

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

AFFIDAVIT IN SUPPORT OF APPLICATION
FOR ATTORNEYS FEES

JUDGE HENRY WERKER
STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have the sole responsibility for the preparation and prosecution of this federal litigation, including the application now pending before this Court.

3. Previously I was almost entirely responsible (although not exclusively responsible) for the preparation

and prosecution of the administrative proceedings in the New York State Division of Human Rights (as a consequence of the deferral thereto by the New York District Office of the Equal Employment Opportunity Commission after the Plaintiff herein initially filed a complaint with said Commission charging the Defendant New York Gaslight Club, Inc. with racially discriminatory conduct).

4. In addition, I was exclusively responsible for the representation of the Plaintiff herein in administrative and judicial proceedings subsequent to the proceeding before the New York State Division of Human Rights (including the proceedings before the New York State Human Rights Appeal Board, an entity separate and apart from and independent of the New York State Division of Human Rights, and proceedings before the New York State Supreme Court/Appellate Division—First Judicial Department and the New York State Court of Appeals).

5. As a consequence of my efforts in this proceeding and in the proceedings convened prior to the institution of this federal action but in connection therewith (as a consequence of the interrelatedness by and between state proceedings and federal Title VII enforcement effort—per the federal statutory scheme), I undertook the following: After consultation with the Plaintiff, preparation and filing of Complaint with the New York District Office of the Equal Employment Opportunity Commission; Preparation and presentation of evidence before the New York State Division of Human Rights (subsequent to the filing of a complaint therein by the Plaintiff as a consequence of the federal referral and deferral thereto); Preparation and

submission of Post Hearing Brief (Memorandum) to the Hearing Examiner (Norman Mednick) in the New York State Division of Human Rights; Preparation and submission of papers in opposition to the Defendants Motion to the New York State Human Rights Appeal Board for a stay pending the outcome of their appeal to said Board from the decision of the New York State Division of Human Rights (which was favorable to Plaintiff); Preparation and submission of Brief to the New York State Human Rights Appeal Board; Preparation and submission of papers and Brief to the New York State Supreme Court/ Appellate Division—First Judicial Department in response to appeal thereto by the Defendants from the decision in both the New York State Division of Human Rights and the New York State Human Rights Appeal Board (which decisions were adverse to said Defendants); Preparation and submission of papers in opposition to Motion of the Defendants to the New York State Supreme Court/Appellate Division—First Judicial Department for Reargument from the unanimous decision of that Court which affirmed the administrative decisions or in the alternative for Leave to File an Appeal with the New York State Court of Appeals in this matter (which Motion was ultimately denied); Preparation and submission of papers in opposition to the Motion to the New York State Court of Appeals by the Defendants requesting said Court to assume jurisdiction of an appeal from the foregoing decision and orders of the Appellate Division (which Motion before the Court of Appeals was denied); Preparation and submission of Complaint to this Court (pursuant to the Notice of Right to Sue Letter received by the Plaintiff from the Equal Employ-

ment Opportunity Commission); Preparation of papers to this Court in connection with the pending issue (regarding attorneys' fees), including the submission of a memorandum (and preparation thereof) and the preparation and submission of affidavits (including the one herein) attendant thereto.

6. In connection with the foregoing, I spent the following hours relative thereto:

a. Consultation and drafting of Complaint to the Equal Employment Opportunity Commission (5 hours).

b. Preparation and presentation of evidence before the New York State Division of Human Rights (7 hours).

c. Preparation and submission of Post Hearing Brief to the New York State Division of Human Rights (15 hours).

d. Preparation and submission of papers in opposition to application by the Defendants for a stay pending appeal to the New York State Human Rights Appeal Board (5 hours).

e. Preparation and submission of Brief to the New York State Human Rights Appeal Board (8 hours).

f. Preparation and submission of Brief to New York State Supreme Court/Appellate Division—First Judicial Department (8 hours).

g. Preparation and submission of papers in opposition to Motion of Defendants to Appellate Division

for Reargument or otherwise for leave to appeal to the New York State Court of Appeals (3 hours).

h. Preparation and submission of Brief to New York State Court of Appeals in Opposition to Motion of Defendants for Leave to Appeal thereto (from the adverse decision(s) of the Appellate Division—First Judicial Department) (5 hours).

i. Preparation and submission of Complaint to the United States District Court for the Southern District of New York (4 hours).

j. Preparation of Memorandum in support of Application for Attorneys' Fees and Affidavits attendant thereto (22 hours).

7. The total amount of time spent in this matter, as set forth above, is eighty two (82) hours. Included in said time was research, writing, communication with counsel for the Defendants, my client, and counsel for the New York State Division of Human Rights. All of the aforementioned takes into account the various efforts attendant to research and presentation, including examination of information received and documents prepared by counsel for the Defendants and counsel for the New York State Division of Human Rights.

8. In addition to the foregoing, Plaintiff's counsel has spent substantial numbers of hours in attempting to work out the implementation of the decretal order issued by the New York State Division of Human Rights, something which has not, to this date, been completed (at least relative to the resolution of the backpay award, still unpaid). I

have not set forth any of the hours attributable to the efforts in this respect.

9. I am seeking the sum of one hundred dollars per hour ($100.00 per hour) for my efforts herein.

10. I believe that, in view of my experience, the nature of the case herein, and the favorable resolution of the matter to the Plaintiff, the sum of one hundred dollars ($100.00) per hour is not unreasonable.

11. I graduated from Syracuse University College of Law in 1969 with a J.D. Degree. Prior to that I secured a B.A. Degree from the University of Pittsburgh (graduating therefrom in June, 1966).

12. Upon completion of my law studies, I took the bar examination for admittance to practice before the courts of the State of New York, in the summer of 1969; and I passed said examination.

13. I enlisted in VISA in September, 1969, and became associated with the Charlotte-Mecklenburg Legal Aid Society in North Carolina for the next approximately thirteen months.

14. In October, 1970, I became associated with the Office of the General Counsel of the National Association of the Advancement of Colored People as Assistant General Counsel; and I continue to be associated therewith and hold the same position to date.

15. During the seven and one half years which I have been associated with the afore-mentioned office I have been

involved in approximately ninety civil rights efforts, most of which involved some court dynamic (although not exclusively) and a great many of which I was involved in (court-wise) in one form or another.

16. I have been involved in approximately thirty (30) efforts wherein I have been primarily, if not sometimes exclusively, responsible for the preparation and prosecution of the entire case (including pre-trial discovery, the trial and the post trial effort, including all aspects of the appellate level work). These cases have been largely federal court cases although it does include some state court work (including the trial and appellate level) and some federal and state administrative work (wherein both conciliation and adjudicatory efforts were undertaken).

17. Included among the cases in which I have been primarily, if not solely, responsible are the following: *State* v. *Rogers,* where, with two other attorneys, I defended a young Black individual who had been accused of rape. Said trial took place in Fort Smith, Arkansas. Said youth was convicted and sentenced to life without parole. State appellate process pursued, unsuccessfully (with dissent); and a federal habeas corpus (in which I am solely responsible) is now pending in the Eastern District of Arkansas (*Rogers* v. *Britton*); *Russ* v. *Ratliff,* wherein I was primarily responsible for preparation and prosecution of wrongful death case (shooting death of Black man by white Star City, Arkansas policeman) in federal court before twelve-person jury. Verdict was rendered against us and, upon appeal (solely prepared and prosecuted by me), the United States Court of Appeals for the Eighth Circuit reversed the jury

verdict and set it aside, finding and holding that, if the civil rights acts are to have any meaning, the verdict could not stand. We are presently back before the Eighth Circuit regarding, responsibility, if any, of the City of Star City, Arkansas once damages are assessed; ar a related matter, I was primarily responsible for the preparation and prosecution of the civil action encaptioned *The N.A.A.C.P., etc., et al.* v. *Bell, etc., et al.,* a decision of which was just rendered by the United States District Court for the District of Columbia, the Honorable Barrington Parker, presiding, wherein I was awarded attorney's fees of approximately $25,000.00 (twenty-five thousand dollars) based on the rate of $100.00 (one hundred dollars) per hour. A copy of said decision is attached hereto and made part hereof. Said Court took note of my reputation in the area of civil rights as principal attorney in that matter; *Hart* v. *Community School Board,* is the first New York City school desegregation matter decided by a federal court. I was solely responsible for the preparation and prosecution of the trial as well as all of the appellate aspects thereof (of which there were several aspects). A finding of liability rendered by the District Court was affirmed by the Second Circuit with the so-called "Hart standard" becoming a national standard of which there has been much written by academicians and the Court since it was enunciated; at present there is pending before the United States District Court for the Eastern District of New York, the Honorable John F. Dooling, Jr., presiding, the case of *The Parent Association of Andrew Jackson High School* v. *Ambach,* still another New York City school desegregation matter in which I was solely responsible for the preparation and prosecution thereof; *Patterson* v. *City of Syracuse,* a matter which I

was almost exclusively responsible for preparing and prosecuting in the New York State Division of Human Rights and which is believed to contain one of the largest records of a matter adjudicated therein (in excess of four thousand pages). We were partially successful and proceedings attendant thereto followed (in both the administrative appeal level and in the various New York State appellate courts); *Herring* v. *City of Syracuse* is a wrongful death matter which I tried along with George E. Hairston, Esq., one of the co-counsel for the Plaintiff herein. Said matter was tried before a jury of six persons in Syracuse, New York (the Supreme Court/Onondaga County) and a non-unanimous verdict was rendered. Matter is now on appeal before the Appellate Division/Fourth Judicial Department; in this Court and before your Honor, I did prepare and prosecute the matter of *Jackson* v. *New York City Health and Hospitals Corporation*, a case wherein we sought a preliminary injunction to foreclose the City from closing Morrisania Hospital. This Court denied said relief (after a hearing) and dismissed said action; in *Snead* v. *Department of Social Services*, this Court, by Judge Weinfeld sitting and writing for a three-judge panel, held Section 72 of the New York Civil Service Law unconstitutional. Said decision was ultimately vacated by the United States Supreme Court *on other gounds.*

18. The foregoing represent a sampling of the many, many cases in which I have been involved and continue to be involved.

19. Based on the foregoing and the attached decision, I do believe that the fee which I am requesting herein

is reasonable and justified, recognizing that any Human Rights case/civil rights case/civil liberties case is inherently difficult notwithstanding that some are of course more difficult than others and that the fact pattern herein was concededly simpler than many of those matters which I otherwise undertake and handle.

20. As noted the foregoing is not an exhaustive list, by any stretch, of the matters in which I have been involved singularly or in conjunction with others.

21. I have argued matters in the United States Courts of Appeal for the Second Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Tenth Circuit and the Court of Appeals for the District of Columbia. I have tried cases and otherwise been involved in proceedings before the United States District Courts for the District of Columbia, the Northern District of Florida, the Southern District of Ohio, the Eastern District of Arkansas, the Southern District of Mississippi, the Eastern District of Oklahoma, the Northern District of New York, the Western District of New York, the Eastern District of New York and the Southern District of New York.

22. I believe myself to be a reasonably experienced civil rights litigator and appellate advocate; and I believe that said reasonable experience is manifested by the foregoing discussion.

WHEREFORE and in view of the foregoing, I respectfully request that I be awarded the sum of $8200.00 (eighty-two hundred dollars) as reasonable attorney's fee for efforts in this matter (consistent with the Memorandum of Law which

Affidavit of James I. Meyerson in Support of Application for Attorneys Fees

permits such an award and encourages the same in view of the policy purpose of Title VII of the Civil Rights Act of 1964).

Respectfully submitted,

/s/ James I. Meyerson, Esq.
James I. Meyerson, Esq.

(Sworn to by James I. Meyerson, Esq. on April 17, 1978.)

Supplemental Affidavit of James I. Meyerson

In the
UNITED STATES DISTRICT COURT
For the Southern District of New York
77 Civ. 4794

Ms. Cidni Carey,
Plaintiff,
vs
New York Gaslight Club, Inc., *et al.,*
Defendants.

Supplemental Affidavit

Judge Henry Werker
State of New York,
County of New York, *ss.:*

James I. Meyerson, being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity.

2. I have been primarily (almost solely) responsible for all of the representation of the Plaintiff herein and through the state administrative and judicial proceedings which have transpired heretofore.

3. In my initial Affidavit herein, submitted contemporaneously with Plaintiff's Memorandum in Support of her

Application for Attorneys' Fees herein, I mis-spoke in Paragraph #32 (as well as in the Memorandum wherein I reiterate said error).

4. I noted in Paragraph #32 that Plaintiff never requested that the Equal Employment Opportunity Commission reassume jurisdiction over this matter, pursuant to Title VII provisions and subsequent to the initial deferral by said Commission after the Plaintiff had initially filed her complaint against the Defendants with said Commission.

5. However, in reviewing my letter to Mr. Frank Patterson, Supervisor/Case Control, New York District Office of the Equal Employment Opportunity Commission, dated May 20, 1975, a copy of which is attached to my initial Affidavit and a copy of which is attached hereto, it is obvious that I did request that the Equal Employment Opportunity Commission reassume jurisdiction over the complaint, it being more than sixty (60) days since the matter was deferred to the New York State Division of Human Rights by said Commission.

6. Said letter makes it known that the Plaintiff was seeking for the Commission to assume (reassume) jurisdiction should it be necessary for the Plaintiff to secure a Notice of Right to Sue Letter.

7. Referring to my letter of June 2, 1975 to the Plaintiff, a copy of which is attached to my first Affidavit and a copy of which is attached hereto, we did believe that the Commission, per our request, did implicitly, if not ex-

plicitly, advise us in its letter to me, dated May 22, 1975 (a copy of which is attached to my initial Affidavit and a copy of which is attached hereto), that it had reassumed jurisdiction over Plaintiff's matter.

8. As I advised the Plaintiff, it was my understanding (and still remains my understanding) that the Equal Employment Opportunity Commission has a tremendous case load making it likely that an investigation of the complaint by said Commission would not and will not be undertaken for approximately one year (if not more) from the time that said Commission reassumes jurisdiction.

9. It is apparent that the Plaintiff herein viewed her efforts in the New York State Division of Human Rights as a very integral part of her federal Title VII effort.

10. Certainly, once the Plaintiff secured a favorable verdict by and through the State Division of Human Rights as a consequence of the deferral action, the Plaintiff did view said proceedings as the primary mechanism for resolving the controversy which had been initiated by the filing of the complaint with the Equal Employment Opportunity Commission (without the need for Commission efforts or federal court litigation).

11. It was through the deferral and the ultimate resolution in the New York State Division of Human Rights that the Plaintiff secured relief relative to her Title VII complaint.

12. As a matter of fact, the congressional statutory scheme envisioned just such a dynamic (thus the reason

for including in that federal statutory scheme deferral reference to state proceedings).

13. It is obvious that the Equal Employment Opportunity Commission did not begin its efforts in this matter until on or about November, 1976, well over one year after it assumed (reassumed) jurisdiction herein; and that, when it did the same, it learned that the Plaintiff had been successful in the New York State Division of Human Rights, as a consequence of the deferral, and that, accordingly, there was really nothing at that point in time to do since the matter had, in effect, been resolved.

14. It should be noted that the matter in the State Division of Human Rights was not resolved, voluntarily, through conciliation efforts; but rather was resolved through an administrative adjudicatory process whereat hearings were held, evidence produced, and briefs ultimately submitted. At the conclusion of said administrative trial, the New York State Division of Human Rights did issue a Decision and Order in favor of the Plaintiff.

It is submitted, then, that the efforts in the New York State Division of Human Rights, by which this federal Title VII matter was, in effect, resolved, were and are intricately a part of the "proceedings" envisioned with the federal statutory Title VII scheme.

WHEREFORE, Plaintiff respectfully requests that she be awarded appropriate attorneys' fees for her efforts under-

taken in the New York State Division of Human Rights and in other proceedings related thereto.

Respectfully submitted,

.....

JAMES I. MEYERSON, ESQ.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100
Attorney for Plaintiff

By: /s/ JAMES I. MEYERSON

(Sworn to by James I. Meyerson on April 15, 1978.)

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 4794

MS. CIDNI CAREY,

Plaintiff,

vs

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

Now comes the Plaintiff herein, by and through her attorneys, and respectfully moves this Court to modify its Memorandum Decision Order, handed down on September 15, 1978 and entered with the Clerk on September 21, 1978 (a copy of which is attached hereto). In addition, the Plaintiff seeks leave of this Court to supplement the record herein upon which the Application for Attorneys' Fees is premised. Said Motion is brought pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Respectfully submitted,

NATHANIEL R. JONES, Esq.
JAMES I. MEYERSON, Esq.
1790 Broadway—10th Floor
New York, New York 10019
(212) 245-2100
Attorneys for Plaintiff (Moving Party)

/s/ JAMES I. MEYERSON

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

AFFIDAVIT OF JAMES I. MEYERSON

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

JAMES I. MEYERSON, Esq., one of the attorneys for the Plaintiff herein (Moving Party), being first duly sworn, deposes and says:

1. I am one of the attorneys for the Plaintiff herein; and I execute this Affidavit in that capacity. I am fully with all of the proceedings which have transpired to date in this matter (administratively and otherwise) as I have had the primary (and sometime sole) responsibility for the preparation and prosecution of all aspects of this matter on behalf of Ms. Carey, the Plaintiff herein and the Complainant in the proceedings before the New York State Division of Human Rights.

2. By its decision and order, dated September 15, 1978 and entered with the Clerk of the Court on September 21, 1978, this Court denied to the Plaintiff's attorneys attorneys' fees for their successful preparation and prosecution of the proceeding before the New York State Division of Human Rights.

3. At page three of said decision, this Court wrote:

"The plaintiff had the option of pursuing her state administrative remedies without incurring any expenses at all for legal services since section 297 of the New York Human Rights Law provides that the 'case in support of the complaint shall be presented by one of

the attorneys or agents of the Division.' Rather than availing herself of such free representation the plaintiff chose to be represented by privately retained counsel."

4. Plaintiff's counsel received formal notification of the entry of the Memorandum Decision and Order, from which the above quote is excerpted, on September 27, 1978. A copy of said notification is attached hereto and made part hereof (having thereon the date notation on which the document was received in the office of Plaintiff's counsel). On September 28, 1978, Plaintiff's counsel did obtain a copy of the Memorandum Decision in the Office of the Opinion Clerk, United States District Court, Southern District of New York.

5. Upon reading the same and particularly the above excerpted quote, the Plaintiff's counsel did call the New York State Division of Human Rights, Office of the General Counsel, and did speak with one attorney therein with whom he had previously associated in Division proceedings.

6. It has always been my position that the Division attorney, when ostensibly representing the complainant in a Division proceeding, is, in reality and in theory, representing the Commissioner of the New York State Divison of Human Rights, upon the complaint, and not the complainant himself/herself.

7. Thus in a proceeding where the complainant does not prevail (by Commissioner's decision and order) and is represented by the Division attorney (ostensibly), the Divi-

sion attorney cannot appeal the adverse decision, upon the complaint and for the complainant, because such would be be inconsistent with the finding of the Commissioner whom the Division attorney, in reality and in theory, represents.

8. Moreover, where the complainant secures only partial relief, upon prevailing, and seeks further relief in an appeal, the Division attorney will not represent the complainant in said effort since to do so would be inconsistent with the position of the Commissioner, whom said attorney represents upon the complaint of the charging party.

9. Furthermore, where a party prevails before the Commissioner and an appeal is prosecuted by the non-prevailing party to the Appeal Board and the decision is reversed by the Appeal Board (against the complainant and the Commissioner), nevertheless it is believed that the Division attorney (who would appear before the Appeal Board to justify the decision of the Commissioner, upon the complaint of the charging party) would not and cannot appeal the decision of the Appeal Board to the Courts of the State of New York.

10. All of the aforementioned was confirmed to me by an attorney in the Office of the General Counsel of the New York State Division of Human Rights (per my telephone conversation with her on Thursday, September 28, 1978).

11. It is apparent, therefore, that the Division attorney does not represent the complainant (charging party) but rather the Commissioner, upon the complaint of the charging party.

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

12. It is apparent, as well, in the instant case, the Division attorney represented the Commissioner and not the Complainant.

13. Thus it is submitted that it is error to hold, as this Court did, that the Plaintiff herein had the option of obtaining a Division attorney where, it is apparent, that the attorney represents the Commissioner, upon a complaint and not the complainant, and where, it is apparent, that conflict in that representation effectively denies to the complainant effective representation.

14. It was error, as well, for the Court to hold that the Plaintiff herein went out and retained private counsel. The Complainant did not have funds to secure a private attorney and did not pay any monies to the attorneys, employed by the N.A.A.C.P. Special Contribution Fund, Inc., who did, in fact, represent the Plaintiff (more specifically, James I. Meyerson, Esq.).

15. James I. Meyerson, Esq., as employed by the N.A.A.C.P., undertook to represent Ms. Carey in the public interest and as a private attorney general seeking to enforce the federal laws and policies against employment discrimination (as set forth more fully in Title VII of the Civil Rights Act of 1964, as amended—42 U.S.C. Section 2000(e) *et seq.*).

16. To the extent that the proceedings eventually took place in the New York State Division of Human Rights, they did so as a consequence of federal deferral under the federal law and rules governing Title VII complaints.

Motion Seeking Modification of Memorandum Decision and Order and Seeking Leave to Supplement the Record Herein (Rule 52) and Affidavit Annexed Thereto

17. Thus, if the Plaintiff herein had not secured the public interest attorneys employed by the N.A.A.C.P. (and had not been able to obtain other public interest attorneys), she would not have had, in fact, a full and complete representation in the Division proceedings (to the extent that the Division attorneys represent the Commissioner rather than the complainant—upon the complaint of the charging party).

In view of the foregoing, Plaintiff herein submits that this Court should modify its findings and otherwise amend its conclusion and award Plaintiff's counsel attorneys' fees upon the application heretofore submitted. In addition, Plaintiff requests leave to supplement the record herein with further evidence corroborating the statements herein made (statements made in light of the apparent misunderstanding by the Court of the responsibility and representative capacity of the State Division attorney in a State Division proceeding).

Respectfully submitted,

JAMES I. MEYERSON, Esq.
N.A.A.C.P.—1790 Broadway
New York, New York 10019
(212) 245-2100
Attorney for Plaintiff

/s/ JAMES I. MEYERSON

(Sworn to by James I. Meyerson on September 29, 1978.)

Affidavit of Adele Graham

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MS. CIDNI CAREY,

Plaintiff,

—against—

NEW YORK GASLIGHT CLUB, INC., *et al.*,

Defendants.

AFFIDAVIT

ADELE GRAHAM, being duly sworn, deposes and says:

1. I am an attorney on the staff of ANN THACHER ANDERSON, General Counsel of the State Division of Human Rights, and am assigned to the position of Supervisor of the Administrative Hearing Section. As such, I am fully familiar with the practices of the State Division of Human Rights, particularly with respect to the presentation of cases at public hearings, for which I bear the primary responsibility, as well as on appeals thereof. I make this affidavit at the request of JAMES I. MEYERSON, Esq., attorney for the plaintiff in the above-entitled action. I have read Mr. Meyerson's motion and the defendant's memorandum submitted in opposition.

2. The hearing caseload of the Division of Human Rights has more than doubled in the last three years, and doubled as well in the previous three or four years, while the staff of attorneys available to handle the cases has

been approximately halved. As a result, it became necessary drastically to revise the Division's procedures with respect to the presentation of such cases at public hearing.

3. One of the major methods utilized was the elimination of the prior practice of assigning a Division attorney to every case. Complainants were encouraged to obtain private counsel and, in the overwhelming majority of such cases, the Division attorneys' participation in the presentation of the cases at public hearing routinely was reduced to administrative duties and occasional consultation about procedures. This practice was subsequently codified in a major revision of the Division's Rules of Practice 9 NYCRR § 465, promulgated October 18, 1977. See § 465.11, ***Representation by an attorney.***

4. The Division's records reveal that such practice was followed in the public hearing of *Carey* v. *New York Gaslight Club, Inc.* The Division attorney did not appear at all during the extensive two day trial at which the complete record was made; the entire burden of placing evidence into the record, and arguing the significance thereof, was borne by the attorney for the plaintiff.

5. Even before the practice of assigning a Division attorney to each hearing case changed, as aforestated, the Division made a distinction with respect to its obligations under § 297.4(a) of the Human Rights Law. This distinction was based upon the two disjunctive sentences therein: "The case in support of the *complaint* shall be presented by one of the attorneys or agents of the Division and, at the option of the complainant, by his attorney. With the consent of the Division, the case in support of the *com-*

plainant may be presented solely by his attorney." (Emphasis supplied.) The Division interpreted this statutory language as requiring a distinction between the *complaint* which the Division was required to further, and the *complainant*, whose private interests might or might not be identical with the public interests represented by the Division. There is not infrequently some substantial difference between the public interest the Division has in the complaint, and the private interests of the complainant. In presenting a case at public hearing, or in settling a public hearing case, the Division attorney is instructed that his/her primary responsibility is the protection of the public interest.

6. The quoted language of § 297.4(a) as to the obligations of the Division attorney to the complaint refers only to the public hearing aspect of a case. The entire Section § 297.4(a) spells out the procedures for public hearings, only. The Defendants' memorandum, at page 3, obviously misreads the statute on this point. Appeals to the State Human Rights Appeal Board and to the appropriate State courts are covered procedurally by §§ 297-a and 298. No specific reference is contained in those sections as to the Division's obligations to argue appeals.

7. The Division is however authorized to obtain enforcement of its order or of the order of the State Human Rights Appeal Board, by the terms of § 298, and has historically read into that obligation the implicit power to argue for affirmance of its orders on a respondent's appeal thereof. This power is exercised on behalf of the Division, seeking to uphold its order, and not on behalf of the complainant.

8. The Division's actions before the Board and the Courts in upholding its Order may readily be seen as distinct from the situation obtaining when the complainant is dissatisfied with an Order after Hearing. The Division, through counsel, does not participate in such an appeal on behalf of the complainant, who must pursue an appeal either *pro se* or through private counsel. The Division's legal staff must support the Commissioner's Order After Hearing, even though such support is inimical to the interests of the complainant.

9. Illustrative of the lack of identity of interest between the Division and the complainant may be seen in several recent matters where the Order After Hearing upheld the complaint, but full relief was not awarded to the complainants. The complainants were then required to take appeals in order to obtain such full relief, but without the legal assistance of the Division.

10. In another recent case, the State Human Rights Appeal Board reversed an Order After Hearing favorable to a complainant. The Division was unable lawfully to provide legal counsel since it is bound, by the terms of § 297-a of the Human Rights Law, to the decisions of the board. The complainant had to secure private counsel to prosecute a successful appeal of that reversal to the Appellate Division, Fourth Department.

/s/ ADELE GRAHAM
Adele Graham

(Sworn to by Adele Graham on October 18, 1978.)

Complaint—New York State Division of Human Rights

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

on the complaint of

CIDNI CAREY,

Complainant,

—against—

GASLIGHT CLUB; RAY ANGELIC, Manager
& JOHN ANDERSON, Manager,

Respondent.

I, Ms. Cidni Carey residing at 61-25 98th Street, Rego Park, N.Y. 11374 Tel. No. ..... charge Gaslight Club whose address is 124 E. 56th St., NYC Tel. No. PL 2-2500 with an unlawful discriminatory practice relating to employment on or about August 26, 1974 by refusing to hire me because of my AGE ( ), RACE (xx), CREED ( ), COLOR (xx), NATIONAL ORIGIN ( ), SEX ( ).

The particulars are:

1. On Monday, August 26, 1974, I went to the Gaslight Club to apply for a job as a waitress. Prior to appearing at the Gaslight Club, I called to make sure that positions were open, at that time I was asked to come to the Club for an interview.

2. I was interviewed by Mr. Ray Angelic and Mr. John Anderson, Managers of the Club. They are both

White. They told me I had all the qualifications for the job, but I was not hired.

3. On information and belief, the Gaslight Club has no Black waitresses. A White waitress was given the job for which I had applied.

4. I am Black. Based on the foregoing, I charge the Gaslight Club; Ray Angelic and John Anderson, Managers, with discriminating against me by refusing to hire me because of my race and color, in violation of the Human Rights Law of the State of New York.

By reason of the unlawful discriminatory practice of respondent as herein alleged, complainant has already suffered damages in the sum of $ unspecified.

I have not commenced any civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

/s/ CIDNI CAREY

(Sworn to by Cidni Carey on February 21, 1975.)

Order, Findings and Decision of New York State Division of Human Rights

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. (S) CF-36685-75

STATE DIVISION OF HUMAN RIGHTS

on the complaint(s) of

CIDNI CAREY,

Complainant,

—against—

THE NEW YORK GASLIGHT CLUB, INC., RAY ANGELIC, Assistant Manager, and JOHN ANDERSON, Manager,

Respondents.

NOTICE OF ORDER AFTER HEARING

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Hearing Examiner Norman Mednick, Esq. In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at 2 World Trade Center, New York, New York 10047. The Order may be inspected by any member of the public during the regular office hours of the Division.

Order, Findings and Decision of New York State Division of Human Rights

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to the proceeding aggrieved by said Order of the Division may obtain review thereof in a proceeding before the State Human Rights Appeal Board, 2 World Trade Center, 82nd Floor, New York, New York 10047, provided such appeal is commenced by the filing with the Board of a notice of appeal within fifteen (15) days after the service of this Order.

DATED: AUG 13 1976
NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

/S/ WERNER H. KRAMARSKY
Werner H. Kramarsky
Commissioner

To:

Ms. Cidni Carey
61-25—98 Street
Rego Park, New York 11374

The New York Gaslight Club, Inc.
124 East 56 Street
New York, New York 10022

Mr. Ray Angelic
8 Grandview Avenue
Pawling, New York

Mr. John Anderson
525 East 89 Street
New York, New York

Order, Findings and Decision of New York State Division of Human Rights

Kane, Kessler, Proujansky, Preiss & Permutt, P.C.
Albert N. Proujansky, Esq., *of Counsel*
680 Fifth Avenue
New York, New York 10019

James I. Meyerson, Esq.
George Hairston, Esq., *of Counsel*
NAACP Special Contribution Fund
1790 Broadway
New York, New York 10019

Bevery Gross, Esq., *General Counsel*
Terry Myers, Esq., *of Counsel*
State Division of Human Rights
2 World Trade Center
New York, New York 10047

Hon. Louis J. Lefkowitz
Attorney General
2 World Trade Center
New York, New York 10047

Order, Findings and Decision of New York State Division of Human Rights

STATE OF NEW YORK

EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS

Case No. (S) CF-36685-75

STATE DIVISION OF HUMAN RIGHTS

on the complaint(s) of

CIDNI CAREY,

Complainant,

—against—

THE NEW YORK GASLIGHT CLUB, INC., RAY ANGELIC, Assistant Manager, and JOHN ANDERSON, Manager,

Respondents.

PROCEEDINGS IN THE CASE

On the 21st day of February, 1975, the above-named Complainant filed a complaint, thereafter amended, with the State Division of Human Rights (hereinafter the "Division"), charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

Order, Findings and Decision of New York State Division of Human Rights

After due notice, the case came on for hearing before Norman Mednick, Esq., a Hearing Examiner of the Division. The hearing was held on September 22, 1975, and on January 15, 1976.

Complainant was represented by George Hairston, Esq., and Jame I. Meyerson, Esq. Respondents were represented by Kane, Kessler, Proujansky, Preiss & Permutt, P.C., by Albert N. Proujansky, Esq., of Counsel. The Division was represented by Terry Myers, Esq.

FINDINGS OF FACT

1. Complainant, Cindi Carey, is Black.

2. At all times herein pertinent, Respondent, The New York Gaslight Club, Inc., is a club commonly known as the Gaslight Club (hereinafter Respondent "Club"), and located at 124 East 56 Street, New York, New York.

3. At all times herein pertinent, Respondent Ray Angelic was employed by the Respondent Club as Assistant Manager.

4. At all times herein pertinent, Respondent John Anderson was employed by the Respondent Club as Manager.

5. On or about August 26, 1974, Complainant visited the Respondent Club and applied for a job as an evening cocktail waitress.

6. Evening cocktail waitresses in the employ of the Respondent Club are required to sing and dance.

Order, Findings and Decision of New York State Division of Human Rights

7. Complainant met Respondent Anderson who asked that she sing for Respondent Angelic; Complainant was not asked to dance.

8. At no time thereafter did the Respondent Club offer the Complainant a job as an evening cocktail waitress.

9. From on or about August 27, 1974, to on or about November 21, 1975, the Respondent Club hired at least 11 evening cocktail waitresses, all of whom are Caucasian.

10. Respondent Angelic did not have the authority to hire waitresses; Respondent Anderson had the sole power to hire waitresses.

11. Applicants for evening cocktail waitress positions are not interviewed by Respondent Anderson unless screened and approved by Respondent Angelic.

12. The record shows that Respondent Angelic screened and approved the Complainant and that she was qualified to be an evening cocktail waitress for the Respondent Club.

13. I find that Respondent Anderson did not hire Complainant because of her race and color.

14. The Respondent Club is responsible for the discriminatory acts committed by its agents or employees.

15. There is no evidence in the record that Respondent Angelic discriminated against the Complainant, in violation of the Human Rights Law.

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16. As a direct result of the unlawful discriminatory act committed against her, Complainant sustained a loss of wages in the amount of $52.00 per week, computed on the basis of the average weekly earnings of four evening cocktail waitresses during the period October of 1974 through September of 1975.

DECISION

Based upon the foregoing, I find that Respondents, The New York Gaslight Club, Inc. and John Anderson discriminated against Complainant because of her race and color, in violation of the Human Rights Law.

I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

I further find that Respondent Angelic did not discriminate against Complainant, in violation of the Human Rights Law.

ORDER

Upon the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that the complaint against Respondent Ray Angelic be and the same hereby is dismissed, and it is further

ORDERED, that the Respondents The New York Gaslight Club, Inc. and John Anderson, their agents, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the race and color of such individual, and it is further

ORDERED, that said Respondent The New York Gaslight Club, Inc. and John Anderson, their agents, employees,

Order, Findings and Decision of New York State Division of Human Rights

successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondents shall, within ten (10) days from the effective date of this Order offer, in writing, to employ the complainant in the position of evening cocktail waitress. Complainant shall have five (5) business days in which to accept or reject the said offer. If Complainant accepts, Respondent The New York Gaslight Club, Inc., shall grant to Complainant all the rights, benefits, privileges and seniority to which she would have been entitled had she been employed as an evening cocktail waitress from August 27, 1974.

2. Respondent, The New York Gaslight Club, Inc., shall within ten (10) days from the effective date of this Order, pay to Complainant as backpay, the sum of $52 per week from August 27, 1974 to the date she accepts or rejects the offer set forth in paragraph 1, above, less any sums earned by Complainant during the said period and hours she would have worked for Respondent, and less the standard payroll deductions. Said payment shall bear interest at the rate of six percent (6%) per annum and the interest shall be computed from a reasonable intermediate date, in accordance with Section 5001 (b) of the CPLR. Said intermediate date shall be the date computed by taking the middle date from August 27, 1974 to the date that the Complainant accepts or rejects the Respondent's offer. Respondent shall furnish proof of payment within ten (10) days thereof to the State Division of Humar Rights, Attention Beverly Gross, Esq., General Counsel, 2 World Trade Center, New York, New York 10047.

3. Respondents shall send a memorandum to all their supervisory employees, agents and officers, and to all recognized unions or other organizations representing their employees, instructing them that they have a policy of nondiscrimination because of race and color in the treatment of employees, as well as in employment and work assignments, and that such employees, agents and/or representatives are required to implement the said policy.

4. Respondents shall make available to the duly-authorized representative of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: August 13, 1978
New York, New York

STATE DIVISION OF HUMAN RIGHTS

WERNER H. KRAMARSKI, *Commissioner*